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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION and THE CHICKASAW NATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHEROKEE NATION IN OPPOSITION

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October, 1972

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CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion in this case, rather it disposed of all issues in its Pretrial Order of April 14, 1971, and its Judgment entered the same date. See Appendices A and B hereto. There have been two decisions by the Court of Appeals for the Tenth Circuit in this case which are reported at 402 F.2d 739 (1968) and 461 F.2d 674 (1972).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The petitioner has asserted that the instant case presents two questions for decision by this Court. The Cherokee Nation respectfully submits that the Petition presents no questions which have not already been passed upon by this Court in its earlier decision reported at 397 U.S. 620. If there is a question at all, it is whether the lower courts followed the mandate of this Court and conducted further proceedings consistent with its opinion.

STATUTES AND TREATIES

This Court has previously reviewed and considered the operable treaties, patents and statutes dealing with the granting of fee simple title to the Cherokee Nation and the present disposition of such title. However, of particular interest at this time are: The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836; the Patent executed by President Martin Van Buren, December 31, 1838, and Sections 27 and 28 of the Act of April 26, 1906, 34 Stat. 137, which are here set forth as Appendices C, D, and E.

STATEMENT OF THE CASE

The facts relating to the genesis of this case and its procedural development were previously presented to this Court, when it originally reviewed the matter and rendered its decision in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620. However, in order that all the facts may be before the Court, rather than merely the final fragment of this seem-

ingly endless litigation, the Cherokee Nation will set forth all the facts to date. The mere statement of the case discloses that when this Court, on April 27, 1970, concluded:

> ". . . the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the grants it made to petitioners. The judgments of the Court of Appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion." 397 U.S. 620, 625.

it decided the questions now raised by the Petitioner. This Court rendered its opinion only after the matter had been fully briefed by the parties, after the Government and *amicus curiae* had submitted memoranda, and the case had been twice argued before the Court. The Cherokee Nation submits that the Court received and reviewed essentially the same arguments as are made now.

On December 9, 1966, the Cherokee Nation filed an action in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and its lessees for an accounting and an injunction against the continued use of the land underlying the bed of the Arkansas River [Civil Action No. 6219]. The Cherokee Nation alleged that pursuant to the Treaties of 1828, 1833 and 1835 [7 Stat. 311; 7 Stat. 414; and 7 Stat. 478] and the patent of 1838, the United States granted to the Cherokee Nation the fee simple title to all the land within the metes and bounds description, including the bed of the Arkansas River. The Cherokee Nation further alleged that as a consequence of Section 27 of the Act of April 26, 1906 [34 Stat. 137] (App.

E) "fee title to said river bed lands described herein, as 'lands belonging to the Cherokee Tribe' passed and became vested in the United States in trust for the use and benefit of the members of said Cherokee Nation or Tribe and their respective heirs . . ." In February 1967, the State of Oklahoma filed its answer and counterclaimed to quiet title asserting that upon its admission to the Union title to the river bed of the Arkansas River within its borders passed to and became the property of the State of Oklahoma by operation of law.

The District Court granted the motion of the Choctaw and Chickasaw Nations to intervene as plaintiffs and on September 8, 1967, the Choctaw and Chickasaw Nations filed their answer asserting title to the entire bed of the Arkansas River from the confluence of the Arkansas River and Canadian River to the eastern boundary of the State of Oklahoma.

Prior to the entry of the Choctaw and Chickasaw Nations into the suit, the District Judge had issued a Memorandum of Decision setting forth the operable guidelines of the litigation. Included in the decision was the following:

> "2. The ownership of the river bed. This involves a determination of the legal effect of the treaties between the United States and the Indian Tribes with respect to the land conveyed to the Tribes and as an incident thereto a determination of the rights of the State of Oklahoma in the river bed."

2. Ownership of the River Bed.

> ". . . After considering these and the arguments of counsel relating thereto, the court has concluded that

as a matter of law regardless of the area properly included within the boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, *it was not the purpose or intent of the United States to convey to either tribe ownership of nay part of the Arkansas River* below its confluence with the Grand River, and that no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and *remained the property of the United States* until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, . . ." (Emphasis supplied.)

An appeal was taken to the Tenth Circuit Court of Appeals by notice dated January 24, 1968. At that time the Indian Tribes and the State presented the following issues for review:

"In the sale and exchange of lands with the Cherokee Nation, pursuant to Treaty and Patent, did the United States reserve for a future state title to the land underlying the navigable portions of the Arkansas River in present Oklahoma? (Cherokee brief page 1).

"In the treaties with the Cherokees and Choctaws and the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River below its confluence with the Grand River to the Cherokees or the Choctaws?" (State's brief page 2).

The Court of Appeals in its first opinion, *Cherokee Nation v. State of Oklahoma*, 402 F.2d 739, affirmed the decision of

the lower court. In this opinion, the Appellate Court noted clearly:

> "Title to the river bed in question passed to Oklahoma on admission, *unless prior* thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture." *Id.* at 745. (Emphasis supplied.)

The Nations petitioned for Writ of Certiorari to the Supreme Court, which was granted on April 21, 1969. After two oral arguments before the Supreme Court, the decision of the Court of Appeals was reversed and remanded on April 27, 1970, "for further proceedings consistent with this opinion."

The State of Oklahoma filed its Petition for Rehearing in May, 1970, which was denied by order of the Supreme Court dated June 1, 1970. Pursuant to the directive of the Supreme Court, the Court of Appeals ordered on July 21, 1970:

> "that this case is remanded to the United States District Court for the determination of unresolved issues and such other proceedings as are consistent with the decision of the United States Supreme Court. The mandate shall issue forthwith."

A pretrial conference was held on August 14, 1970, after which the District Court issued its pretrial order setting forth the various issues raised by the parties. Essentially, there were four issues asserted to be remaining: (1) the conflicting claims between the tribes; (2) the actual accounting; (3) the chain of title; (4) the propriety of the accounting action and extent of such accounting. The court

directed that briefs be submitted by the parties on all issues. After consideration of the briefs of counsel on January 12, 1971, the District Court issued its Pretrial Order and stated:

> "It is the opinion of this court that they [the title and interest claims of the defendants] were disposed of; that the decision of the Supreme Court precludes any finding here that prior to Oklahoma's admission to the Union ownership of the river bed was restored to the United States through loss by the Indian Nations of their status as governmental sovereigns, . . ., or lost through adverse possession, . . ."

Further, the court decided the dispute between The Cherokee Nation and Choctaw and Chickasaw Nations, specifically left unresolved by the Supreme Court, in the following manner:

> "These parties have agreed that no evidence is required for the resolution of their disagreement here; that their rights in the matter depend upon the legal effect of the treaties and patents by which they acquired their respective domains west. And from an examination of the applicable language of these documents this court has concluded there is no realistic basis for dispute between them—that the dividing line between their respective tribal properties was fixed as the middle of the main channel of the Arkansas River."

In February 1971, the State and its various leaseholders submitted briefs with regard to the nature and scope of the relief available to the Nations.

The District Court, after consideration of the briefs, entered its Pretrial Order and Judgment on April 14, 1971.

(See Appendices A and B attached hereto.) Thereafter, on April 23, 1971, the Choctaw and Chickasaw Nations filed their Notice of Appeal (No. 71-1210) and on May 5, 1971, the State of Oklahoma and its various lessees filed a Joint Notice of Apppeal (No. 71-1295). (See Pet. Exhibit A.)

The Tenth Circuit Court of Appeals in its second decision in this case affirmed the decision of the District Court with regard to the claims of the State holding "A fair reading of the opinions, majority, concurring and dissenting of the Supreme Court requires the conclusion that the Supreme Court decided present ownership."* *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 677.

The State of Oklahoma, thereafter filed a Petition for Rehearing which was denied on June 27, 1972, and filed its Petition for Certiorari with this Court which was docketed on September 25, 1972.

ARGUMENT

I. There Is No Important Question Presented for Decision

The Petitioner argues that the rights of many private citizens and governmental entities are dependent upon a definitive answer to the question whether the lands in question were granted to the Indian Nations in their sovereign capacity. This case does not present a question of such importance as to merit review by this Court. Indeed, in its prior opinion, 397 U.S. 620, this Court decided either directly or implicitly the questions now presented by the petitioner and considered all points now raised.

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* The Court of Appeals reversed on jurisdictional grounds the District Court's opinion resolving the conflicting claims of the Indian Nations.

Since April 27, 1970, the State of Oklahoma has known that in the opinion of the Supreme Court, by solemn treaty and patent the United States did convey fee simple title to the lands underlying the Arkansas River to the Indian Nations, and that such title is presently held by them for the use and benefit of their enrolled members. See Section 28, Act of April 26, 1906 [34 Stat. 137, 148]; 397 U.S. 620, 625. Simply stated, the State of Oklahoma does not approve of the decision rendered by this Court. Indeed, the State of Oklahoma raised similar public interest contentions in its Petition for Rehearing filed in May 1970. The Court summarily denied the Petition for Rehearing on June 1, 1970.

Review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. (See Rule 19, Rules of the Supreme Court.) There are no important reasons asserted which would warrant reconsideration of this case by the Court. As Mr. Justice Douglas stated in his earlier concurring opinion:

> "Only the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim." 397 U.S. 620, 640.

The ownership of the river bed by the Cherokee Nation does not inhibit the use of the river for navigation. This point was decided expressly by this Court. 397 U.S. at 635. Accordingly there is no valid reason why the Cherokee Nation should be denied its land.

II. The Decision Below Is Clearly Correct

In fashioning its Petition for Certiorari, the State of Oklahoma in a last ditch effort to frustrate the order of this Court has fabricated issues, the answers to which can be found in the decisions which have already been rendered in this case. The simple matter presented for decision is whether the District Court properly interpreted the decision of this Court and the mandate of the Court of Appeals. The Petitioner contends that the Court must now consider whether the Government granted fee simple title to the bed of the Arkansas River to the Indian Nations in their capacities as sovereigns, or whether the grants were made to them for purely private purposes (Pet. at p. 6). This question has already been decided by this Court. The Petitioner argues that while the Indian Nations may have received fee simple title to the river bed pursuant to the treaties in question, title to such land was stripped from them when Congress enacted the so-called Allotment Acts making way for the admission of Oklahoma to the Union. The linch pin of the petitioner's argument is the premise that ownership of the river bed is tied to "sovereignty." Indeed this is the point asserted by Mr. Justice White in his dissenting opinion. This premise, as the Court of Appeals has noted from the outset, is clearly erroneous. In its first opinion, the Court of Appeals stated in a somewhat different context "the property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments." 402 F.2d 739 at 745. The Court of Appeals in its recent opinion reiterated: "However, we are not concerned with sovereignty, a political issue, but with land

ownership. We believe that this question is answered by the 1906 Act." 461 F.2d 674 at 678.

The issue at stake here is the Cherokee Nation's property right in the land not its political existence. The Cherokee Nation took title and held title for its members. It is a well settled principle of law that title to land once vested, as it was here by the Treaties of 1828, 1838 and 1835 and the patent of 1838, could not be divested by any alleged change in the political attributes of the Nation. In *Brewer-Elliott Oil & Gas Company* v. *United States,* 260 U.S. 77, Mr. Justice Taft speaking for the Court stated, "there was nothing in the admission of Oklahoma into constitutional equality of power with other states which required or permitted the divesting of title [to land]." *Id.* at 88.

The petitioner urges again the arguments raised earlier in this Court that the United States could not grant the title to land under a navigable stream because it was not in the public interest. Petitioner has altered the argument somewhat now to assert that the inclusion of The Cherokee Nation's sovereignty was absolutely necessary to support this Court's opinion that the tribes were granted title to the bed of a navigable river and the minerals beneath it, citing *Shively* v. *Bowlby,* 152 U.S. 1, 38 L.Ed. 331 (1894), and *United States* v. *Holt State Bank,* 270 U.S. 49, 70 L.Ed. 466 (1926). Both cases were fully briefed and argued before the Court. In the earlier appearance here, petitioner argued that the Federal Government's power and right to dispose of public lands was limited.[1] The fact

[1] The State before the Supreme Court argued that the "equal footing-implied trust" doctrine compelled the United States to hold the land in

that The Cherokee Nation was a semi-dependent sovereign, *Worcester* v. *State of Georgia,* 31 U.S. (6 Pet.) 515, and enjoyed a unique political existence, *Atlantic & Pacific Railroad Co.* v. *Mingus,* 165 U.S. 413, 435, 436, in that it exercised quasi-governmental autonomy over its people, has nothing to do with the power of the United States to dispose of its public lands and the property rights transferred by the United States.

The sovereign can convey title to lands under navigable waters as it deems necessary and proper. The scope and the power of Congress to transfer title to lands beneath navigable waters is set forth in *Shively* v. *Bowlby,* 152 U.S. 1, 49:

> ". . . [C]ongress has the power to make grants of land below the high water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."

As was pointed out in *Shively* v. *Bowlby,* 152 U.S. 1, and reiterated in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, public purpose is a consideration only when there has been a grant to land under the navigable waters during the period of territorial government. In this

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[1] (Continued)
trust for a future state. Now the State argues that the United States could only dispose of such land to another sovereign since such rivers had to be held for the common good. Such argument is specious.

case Congress did not establish a period of territorial government over the lands owned by the Cherokee Nation. It is well settled that the United States Government may dispose of property in its public domain without limitation. "Congress not only has legislative power over the public domain, [Louisiana Purchase territory was public domain] but it also exercised the power of the proprietor therein." *Alabama* v. *Texas,* 347 U.S. 272 (Per Curiam opinion).

Indeed, the argument raised now, was also advanced and re-asserted in the State's Petition for Rehearing:

> "This Court has in effect overruled *Shively* v. *Bowlby* since it concludes that the United States can dispose of lands under navigable waters just as it can dispose of other public lands" (Pet. for Rehearing p. 5).

The Supreme Court in rendering its decision had clearly answered these arguments:

> "Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby* . . . Rather the question is whether the United States intended to convey title to the river bed to the petitioners. See *Alaska Pacific Fisheries* v. *United States, supra* . . . 397 U.S. at 633, 25 L.Ed. 2d at 624.
>
> "In many respects, however, the Indians were promised virtually complete sovereignty over their new lands. See *Atlantic & Pacific RR Co.* v. *Mingus,* 165 U.S. 413 . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these *basic ownership rights* to the river bed, and we think it very unlikely that the United States intended otherwise." 397 U.S. at 635, 25 L.Ed.2d at 625. (Emphasis ours.)

The United States executed an agreement with The Cherokee Nation whereby tribal title to certain of the allottable land was extinguished and individual grants of allottable land were made. However, in this same agreement tracts of land remained vested in The Cherokee Nation for the benefit of the enrolled members. Act of July 1, 1902, 32 Stat. 716, 727. At the present time land in Oklahoma is held in the name of The Cherokee Nation for the use and benefit of its members.

The petitioner's assertion that title is an incident of sovereignty ignores the realities of the situation. Sovereignty is a political concept. What is involved in this case is the property concept of title and ownership.

The petitioner here argues as did Mr. Justice White in his dissenting opinion,[2] that The Cherokee Nation having lost substantially all attributes of sovereignty prior to statehood, title to the river bed reverted to the United States. Such argument cannot withstand analysis in the light of the pertinent statutes and decisions of the Supreme Court on this point.

The petitioner contends that the statutes preceding the admission of Oklahoma into the Union stripped The Cherokee Nation of its sovereignty so that it ceased to exist as a tribe, bringing about the condition expressed in the grant.

The clause in question was merely an expression of the United States' right of escheat. *Holden* v. *Joy*, 84 U.S.

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[2] Needless to say, this argument by Mr. Justice White was rejected by the majority opinion and is refuted by the plain statements of the statutes preserving tribal existence. Section 28, Act of April 26, 1906. [34 Stat. 137, 148]

[17 Wall] 211 (1872). The title of The Cherokee Nation to the land granted by the Treaties of 1828, 1833, 1835 and evidenced by the patent of 1838 has been considered by the courts and other Government tribunals and *sustained as fee simple title absolute*. In the celebrated *Outlet* case, the Indian Claims Commission sustained the fee simple title as against grantor, the United States. *Cherokee Nation* v. *United States*, 9 Ind. Cl. Comm. 162 (1961). This point again, was fully and completely briefed in the earlier review of this river bed case in the Supreme Court. As Mr. Justice Douglas noted in his concurring opinion:

> "The title held by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple title, cf, *United States* v. *Creek Nation*, 295 U.S. 103, terminable if and when these Indian nations ceased to exist or abandoned the territory—*conditions not yet occurring*." 397 U.S. at 638, 25 L.Ed.2d at 627. (Emphasis added.)

In the Acts of 1902 and 1906, the property rights of the Indian Nations were specifically preserved. Since 1906, many statutes have been passed by Congress preserving the tribes' property rights. See, *e.g.*, Title 25 U.S.C.A. § 933(b), Act of August 26, 1964, P.L. 88-461, 78 Stat. 551; Act of October 21, 1970, P.L. 91-478, 91st Congress H.R. 15624.

Section 27 of the April 26, 1906 Act [34 Stat. 148] specifically provides:

> "That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, *upon the dissolution of said tribes*, shall not become public lands nor property of the United States, but shall be *held in*

trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes. . . ." (Emphasis added.)

Title to the land was provided for by Congress and did not pass to the State under any guise. As was noted in the concurring opinion relative to the effect of said Section 27:

"Certainly, this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle for transferring that title to Oklahoma." 397 U.S. at 641-642, 25 L.Ed.2d at 629.

Section 28 of the same Act [34 Stat. 148] provided:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are *hereby continued in full force and effect for all purposes authorized by law,* until otherwise provided by law, . . ." (Emphasis added.)

To accept the petitioner's argument in this case the Court would have to hold that by the very act establishing the trust for the tribes, the United States violated the trust by disposing of the valuable lands of the trust and giving them to the State of Oklahoma. This certainly is not a reasonable meaning to be obtained from the statute. The United States, as trustee of the Nations, stands in the highest fiduciary relationship. See *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Seminole Nation* v. *United States*, 316 U.S. 286, 296, 297 (1942).

The Congress of the United States clearly resolved the questions and arguments posited here. See also, *Creek Na-*

tion v. *United States*, 318 U.S. 629, 640 (1940), wherein the Court stated:

> "the tribes have not yet been dissolved, and they have had both as a general legal right and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf."

The decision of the Court of Appeals is clearly correct.

III. There Is No Conflict of Decision

The petitioner contends that the District Court and the Court of Appeals misapplied and misconstrued this Court's decision in *Choctaw Nation* v. *Oklahoma*, *supra*, thereby creating a conflict between the decisions (Pet. p. 3). There is no conflict between the decisions of the Supreme Court and the lower courts. As the Court of Appeals noted "a fair reading of the opinions, majority concurring and dissenting of the Supreme Court requires the conclusion that the Supreme Court decided present ownership." 461 F.2d 674 at 677.

To decide the question of present ownership, the Court implicitly, if not expressly, determined that the Indian Nations once having obtained fee simple title never lost it. To assert as the petitioner does that the Supreme Court did not decide the question of present title is to ignore the plain language of the decision and to disregard totally the prior pleadings and prior decisions which form the law of the case in this action.

The Court of Appeals for the Tenth Circuit as did the Supreme Court, has clearly understood the present nature of the Cherokee claim. In its analysis of the applicable

statutes relevant to the affairs of the Five Civilized Tribes the appellate court realized full well that if title had been acquired by the tribes, the Act of April 26, 1906, 34 Stat. 137, required that the lands belonging to the tribes on their dissolution would be held in trust for the use and benefit of the Indians. 34 Stat. 148, 402 F.2d 739, 742; 461 F.2d 674 at 678. Both the Supreme Court and the Court of Appeals recognized that the Oklahoma Enabling Act of June 16, 1906 [34 Stat. 267, 270] provided for Oklahoma's admission to the Union upon the condition:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands . . . and to all lands lying within said limits owned or held by any Indian, tribe, or nation; . . ." 397 U.S. at 635 and 461 F.2d at 677.

In its own constitution (Article I, Section 3), the State incorporated this disclaimer provision.

As Mr. Justice Douglas stated:

> "The bed of the Arkansas *was not allotted*. The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original states. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle *for transferring that title to Oklahoma*." (397 U.S. at pp. 641-642). (Emphasis added.)

The Cherokee Nation has been preserved in existence by Section 28 of the Act of April 26, 1906 [34 Stat. 137, 148]. Unlike the action of Congress taken with regard to other tribes, i.e. Menominee Termination Act of 1954; 68

Stat. 250 as amended 25 U.S.C. §§ 891-902. See also *Menominee Tribe of Indians* v. *United States*, 390 U.S. 404 (1968). The Cherokee Nation has been continued in existence for all purposes authorized by law, including the vindication of the past infringements of its property rights.

The mandate to the District Court was for further proceedings *consistent* with the Supreme Court decision. "The opinion of the Court may be consulted to ascertain the intent of the mandate. *In re Sanford Fork and Tool Company*, 160 U.S. 247, 256. The Supreme Court decision is the law of the case. *Banco National de Cuba* v. *Farr*, 383 F.2d 166, 177-178 (2 Cir. 1967), *cer.t den'd* 390 U.S. 956" [*reh. den'd* 390 U.S. 1037] (Pet. A-6). Indeed, the law of the case directs that a lower court *must* follow the decision of a higher court at an earlier stage of the case with regard to everything decided either expressly or by necessary implication. *Munro* v. *Post*, 102 F.2d 686, 688 (2d Cir. 1939).

The judgment of the District Court and the decision of the Court of Appeals are in accord with the original decision of this Court. To do as the petitioner suggests would result in proceedings *inconsistent* with the opinion of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

PRETRIAL ORDER

On August 19, 1970, following a pretrial conference, the court entered an order determining the issues remaining for disposition in this case. On January 12, 1971, a further order was entered resolving all legal issues raised by the parties except those set out in paragraphs 2, 3 and 7 of the August 19 order. It is the purpose of this order, after a conference with counsel on February 5, 1971, and upon consideration of the briefs submitted to the court, to rule on these issues.

As stated in the order of August 19, 1970, it is the position of the Cherokee Nation that the defendants should be required to account for all moneys paid or due by reason of leases on the portion of the Arkansas river bed here

involved for oil, gas and other minerals, or for other purposes, and that when the amounts have been determined the money should be paid into the registry of the court for distribution to the nation or nations entitled to it. The Choctaw and Chickasaw Nations, on the other hand, in their amended answer filed by leave of court, contend that any taking by the defendants from the surface or subsurface of the river bed was wrongful and reimbursement therefor should be made to the extent of the full value. The view of the State of Oklahoma and the other defendants is that if the State of Oklahoma was not the owner of the river bed, its leases to the other defendants were a nullity and any moneys received should be returned.

From a strictly legal view of the problem, the position of the Choctaw and Chickasaw Nations may be correct, at least in part, and anything taken by the defendants was without authority and ought to be returned. Consistent with this view, any money received by the State of Oklahoma from the other defendants ought to be handed back; it was accepted in payment for leaseholds on land the State did not own. But in the opinion of the court practical considerations in the circumstances of this case require sustaining the position of the Cherokees.

The Cherokee Nation and the Choctaw and Chickasaw Nations owned this strip of land (the portion of the bed of the Arkansas River with which we are concerned here) for nearly 140 years without knowing it, or at any rate without asserting such ownership. For almost 63 years the defendants have labored under the impression that this same piece of property belonged to the State of Oklahoma, and there is respectable opinion that this view was not without reasonable grounds. (See Choctaw, et al. v. Oklahoma, 402 F. 2d 739; dissenting views, 397 U.S. 620). During the period the State has claimed ownership the river has changed its bed many times—gradually, in some places; suddenly in others;

and more recently, by deliberate diversion in connection with the restoration of navigability. To pursue the course proposed by the Choctaw and Chickasaw Nations against the defendants would require an inquiry concerning every segment of the river upon which leases had been executed by the state, not only to determine whether there had been a taking, and if so, the nature and extent, but also to determine whether the river was still flowing where it did when the tribal lands were allotted in severalty, and if not, how it got there. In view of the river's history of meandering it certainly cannot be assumed that every portion of its bed leased by the state belonged at the time to the Indian tribes and not to someone else. In the absence of an assertion to the contrary, therefore, the court is of the opinion that the burden in time and money and expense to the parties and the court is out of all proportion to any recovery reasonably to be expected. Assuming without discussion the unassailability of the Choctaw and Chickasaw Nations' position from a strictly legal view, practical considerations obviate the wisdom of following it. Nor do the equities of the matter favor the Choctaw and Chickasaw position. The mistake of Oklahoma and the other defendants in creating the situation that now exists is certainly no greater than the mistake of the tribes in not recognizing their ownership, or in not asserting it if they did. It is the opinion of the court that justice between the parties can best be served by refusing to go back beyond the present determination of ownership in fixing responsibility and liability for any taking of oil, gas, and other minerals, including sand and gravel, by the defendants. In this connection, it might be pointed out that these Indian Nations are by this view deprived of no greater legal right than persons convicted in violation of their constitutional rights but not now permitted to assert such defense.

If the defendant companies and individuals are not to be held accountable for their takings, if any, from the bed of the Arkansas prior to resolution of the question of own-

ership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or other interests. The leases were acquired for a variety of reasons no doubt, but whatever the reason, in each instance it was obviously felt to warrant the payment of money. Regardless of the lack of ownership on the part of the State of Oklahoma of the property leased, the other defendants got what they bargained for. This would not be true, of course, if the court accepted the position of the Choctaw and Chickasaw Nations, but it does not. By protecting these defendants against being held accountable for any property belonging to the Indian tribes the court has at the same time, necessarily, precluded the return of sums expended by them for leaseholds from the State of Oklahoma. Their demand for the return of such funds, and the State of Oklahoma's concurrence in such demands, should therefore be denied.

This brings up the problem of what to do about the money received by the State of Oklahoma for leases on property it did not own. It might appear that if the legal relationship between the other defendants and the Indian Tribes is to start with determination by the court of ownership of the river bed, then the legal relationship between the defendant State of Oklahoma and the tribes ought to begin at the same time, which would leave the money in the hands of the State. But this result does not necessarily follow, and should not. The unwillingness of the court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the court to permit the tribes to hold such purchasers responsible for anything taken under the leases up to this point. No such gain or loss is involved on the part of the State of Oklahoma; it gains nothing and loses nothing by the ruling. To permit it to keep such moneys, then, would be inequitable in the extreme—a matter which is plain on its face and requires no discussion. It is the opinion of the court, therefore, that all moneys received by the State of Oklahoma from the

other defendants for leasehold interests in the bed of the Arkansas River heretofore claimed by the State were received and have been held in trust for the Cherokee Nation and the Choctaw and Chickasaw Nations, and that the State should now be required to account therefor; and further, that all sums owing therefor but now held in suspense by any defendant should be accounted for to the court by such defendants.

At the several pretrial conferences held during the pendency of this litigation the parties thereto by counsel of record have advised the court that no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; that no oil or gas leases have been executed except on that part of the bed of the Arkansas River below its confluence with the Canadian; and that no sand and gravel leases which represent any significant leasehold payments to the State have been executed on that part of the Arkansas River bed between the confluence of the Grand and the Canadian. The court is of the opinion, therefore, that no evidentiary hearing is required to determine the basis for distributing to the tribes the money which may be deposited with the registry of this court in accounting for leasehold payments made and owing; and that such moneys deposited with the court should be distributed one-half to the Cherokee Nation and one-half to the Choctaw and Chickasaw Nations.

All issues having been resolved by this and preceding pretrial orders, and nothing remaining to be determined upon an evidentiary hearing, judgment will be entered accordingly.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

JUDGMENT

In accordance with the mandate of the United States Court of Appeals, Tenth Circuit, and the pretrial orders heretofore entered in this case under dates of August 19, 1970, January 12, 1971, and April 14, 1971, determining all issues herein involved,

IT IS ORDERED, ADJUDGED AN DECREED that:

1. The plaintiff, the Cherokee Nation or Tribe of Indians, is the owner of the entire bed of the Arkansas River between its high water banks from its confluence with the Grand River to its confluence with the Canadian River, subject only to the right of the United States of America

to restore, maintain, and exercise dominion and control over navigation and to any rights that may now exist in others as a result of avulsive changes in this portion of the river since distribution of the Cherokee lands to individuals.

2. From the confluence of the Canadian River with the Arkansas River to the Eastern Oklahoma line that part of the bed of the Arkansas River between its high water banks which lies north of the main channel is owned by the Cherokee Nation or Tribe of Indians and that part which lies south of the main channel is owned by the intervenors, the Choctaw and Chickasaw Nations, subject only to the rights of the United States of America heretofore stated with respect to navigation and the rights which may have accrued to others by reason of avulsive changes, if any, since the allotment of tribal lands.

3. The defendant the State of Oklahoma has no right, title, or interest in or to any portion of the Arkansas River between its high water banks from its confluence with the Grand River to the Eastern Boundary of Oklahoma.

4. The remaining defendants have no right, title, or interest by reason of any leasehold or other agreement with the State of Oklahoma to any such portion of said river.

5. Neither the plaintiff nor the intervenors, the Cherokee Nation and the Choctaw and Chickasaw Nations, is entitled to an accounting for any oil, gas, or other minerals, including sand and gravel, or any interest therein, except lease rentals, bonus, and royalty payments, taken or acquired by any of the defendants under or by reason of lease agreements with the State of Oklahoma, and said defendants are not entitled to the return of any money paid to the State of Oklahoma for or in connection with such leases.

6. The defendant State of Oklahoma is required to account to the court for all money at any time received pursuant to or under such leases or agreements, and to de-

posit such sums received or owing in the registry of the court within ninety days. Similarly, all other defendants are required to account for and deposit in the registry of the court all money held in suspense or owing by them under such leases or other agreements with the State of Oklahoma.

7. All leases and other agreements between the State of Oklahoma and the other defendants herein on and covering the property here involved which have not expired are hereby cancelled, set aside and held for naught.

8. When the accounting herein required has been made and approved, and the money deposited, the Clerk of this Court is authorized and directed to issue checks distributing one-half to the Cherokee Nation or Tribe of Indians and one-half to the Choctaw and Chickasaw Nations and deliver them to the respective counsel of record for such Nations.

IT IS FURTHER ORDERED that no costs be awarded to the plaintiff or intervenors.

The court is of the opinion that since this order disposes of all issues in the case (except those that may arise by reason of the accounting herein required), and involves controlling questions of law as to which there is substantial ground for difference of opinion, an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly,

IT IS FURTHER ORDERED that in the event of appeal proceedings in the case be stayed in this court pending disposition on appeal.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX C

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the SEnate of the United States themselves and to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge Elias Boudinot Archilla Smith S. W. Bell John West Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination.

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was

made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious uncertain and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of county "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down sais Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the

Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the

west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb., 14, 1883, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May, 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * * * * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or juris-

diction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the person and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the

Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Represenatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * * * * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * * * * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricked out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,

J. S. Schermerhorn.

Major Ridge, his x mark,	(L.S.)	Te-gah-e-ske, his x mark,	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark,	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark.	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark,	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-Breed, his x mark,	(L.S.)

Signed and sealed in the presence of—

Western B. Thomas, secretary.
Ben F. Curry, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgean U.S.A.
G. W. Currey,
William H. Underwood,
Cornellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,

John Ridge.

March 1, 1836

Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * * * * *

APPENDIX D

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall me made."—

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the

boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with the Canadian river, * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands,

thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hudnred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.—

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be

granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.—

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT, and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN

M. M. GARLAND
Recorder of the General Land Office

APPENDIX E

Act of April 26, 1906, 34 Stat. 137, 148:

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.